

The only issue decided by the Administrative Law Judge in this case and, therefore, the only issue present on appeal is whether the claimant suffered personal injury by accident from August 5, 1991, through April 2, 1992.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant started working at Fuller Brush Company in October of 1985. His job required him to run the mop machine in the cotton department. His physical activities included loading and unloading the carousel of the arm that fed the machine and setting up the machine to run the mops. When a mop was completed by the machine, claimant stacked the same into a cart. Claimant alleges that placing the mops in the cart required him to bend, lift and stoop. Claimant alleges that on January 10, 1992, while he was bending over the bin, he sustained shooting pain in his back and down his right leg. Claimant testified that the condition was very painful and continued for the next two to three months, and his condition stayed about the same depending on how much bending and lifting he did. Claimant testified the right leg pain was constant. Claimant left work on April 2, 1992, which was the start of a weekend and planned to report back to work the following Monday. On April 5, while the claimant was off work and getting ready to mow his yard, the claimant was in the process of scooping dog feces out of the yard when he fell to the ground in extreme back pain. Claimant drove himself to the emergency room at the Central Kansas Medical Center. Claimant did not inform the emergency room staff that he had been injured at work.

Claimant was next seen by Dr. C. Reiff Brown, M.D., on April 7, 1992. Claimant advised Dr. Brown that on April 5, 1992, while at home he bent over to shovel up some dog feces and felt a sharp pain in the middle of his low back which dropped him to his knees and made him unable to straighten up. Claimant filled out a history form at Dr. Brown's office indicating that he had simply injured himself at home and intended to pay for the treatment himself. Claimant was specifically asked by the nurse whether this injury occurred at work and was advised that the injury occurred at home. On April 7, 1992, the claimant did not advise Dr. Brown that he had been injured while at work for the respondent. Dr. Brown saw claimant approximately eight times after April 7, 1992, and Dr. Brown testified there was nothing to make him think that the claimant had an injury other than the one claimant stated at the first examination.

Claimant had been seen previously by Dr. Robert J. Unrein on or about January 10, 1992, and was given ibuprofen. Claimant was unable to remember whether or not he told Dr. Unrein that this was a work-related injury. Dr. Unrein's records were admitted by stipulation; however, those records do not specifically mention any work-related low back injury.

It appears that claimant did suffer a sudden specific injury on April 5, 1992, while at home preparing to mow his yard. He testified that he was scooping dog feces when he felt a sharp pain in his back and actually fell to his knees. This specific occurrence caused claimant to seek immediate medical attention on April 5, 1992, at the emergency room and claimant did not tell the emergency room personnel that this was a work-related injury.

The respondent took the deposition of Lowell Schussler, Lori Schussler, Mike Sohm, and Patty Ogle. Lowell Schussler, claimant's direct supervisor, testified that he does not know if the claimant ever made any report of hurting himself on the job

or not. Mike Sohm, supervisor and in charge of the Cotton Department, testified that there was no indication from claimant in January, 1992, that he had a back injury and he did not report any kind of accident on the job in April of 1992. Claimant did advise Mr. Sohm that he had picked up some trash in the front yard and could not stand back up and had been off work for a period of time. Both Mr. Schussler and Mr. Sohm testified that the job performance of claimant was a physically easy job. Patty Ogle was the manager of insurance and wellness at respondent's plant. She is a licensed practical nurse. Her responsibilities include the responsibility to file the first report of injury. She does not recall claimant making any complaints to her regarding the work-related injury in 1992 for his back. She further testified that if the claimant had made a complaint to the supervisor she would have heard about it as paperwork would have been filled out by her at that point. Lori Schussler, co-employee, testified that claimant did not tell her he was hurt at work. The testimony in these depositions directly contradict the testimony of claimant.

The deposition of Dr. Richard W. Loy was taken on behalf of the claimant. Dr. Loy was given the history by the claimant that he was injured on January 10, 1992, when he bent over a cart to get material and felt extreme pain in his back. Claimant also advised Dr. Loy that he told his supervisor who told him to get back to work or lose his job. Claimant further advised Dr. Loy that, on April 5, 1992, he was getting ready to mow his yard and when he tried to scoop up something in the yard he fell to the ground in extreme back pain and thereafter drove himself to the hospital. Dr. Loy opined that the claimant had a 27% permanent partial impairment to the whole person, using the AMA Guides. Dr. Loy felt that the incident of April 5, 1992, was a direct result of his back injury at work and that the 27% was all related to work activity. Dr. Loy believed that the April 5, 1992, injury was just a manifestation of the prior work injury, not an independent or new injury. Dr. Loy testified he didn't care about the history claimant gave to other doctors -- that he used only the history given to him by the claimant.

Dr. Reiff Brown testified on behalf of the respondent and confirmed that the claimant never reported any work-related injuries to him. Dr. Brown took a history from the claimant that on April 5, 1992, while at home, he bent over to shovel some dog feces and felt a sharp pain in his lower back and dropped to his knees, unable to straighten up. During the period of time Dr. Brown treated claimant, claimant never advised Dr. Brown of any injury while on the job for the respondent. Dr. Brown felt that his entire treatment for the claimant was as a result of the April 5, 1992, injury at home. Dr. Brown indicates he does not believe that he could in any way relate the April 5, 1992, incident to any January, 1992, injury unless he had a history of continuing, persistent back problems during those three months between the two injuries.

The claimant has the burden of proof to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. K.S.A. 44-501(a). "Burden of proof" means the burden of the party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on the issue is more probably true than not true on the basis of the whole record. K.S.A. 44-508(g).

The ultimate decision concerning the extent and nature of the disability is one which must be made by the trier of fact on the basis of the evidence presented. The trier of fact is not bound by the medical evidence presented in the case and has the

responsibility of making its own determination. It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Arising out of the employment and in the course of employment are separate elements. The employee must prove both in order for his claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

"Arising out of the employment" points to the cause or origin of the accident and requires some causal connection between the accidental injury and employment. An injury arises out of employment, if it arises out of the nature, conditions, obligations and incidents of the employment. Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980)

"In the course of employment" relates to the time, place, and circumstances under which the accident occurs and means the injury happened while the employee was at work in his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

Based upon the record as a whole, the Board of Appeals finds that the claimant has not met his burden of proving that his work-related injury arose out of and in the course of his employment. The evidence is clear that the claimant suffered an injury on April 5, 1992, while at home, engaged in his own personal activities. Claimant cannot be said to have suffered an injury arising out of and in the course of his employment. The argument by the claimant that the problems all relate to a January 10, 1992 injury is not supported by the evidence in the record. The Board finds the testimony of Dr. Brown, claimant's supervisors and co-workers and the company nurse to be more probative on the issue of whether the claimant's injury arose out of and in the course of his employment than the unsupported testimony of claimant. Claimant did not report his injury to any physician as a work-related injury until later. The Board therefore agrees with the Administrative Law Judge and holds that the claimant has failed to meet his burden of proving that the injury, more probably than not, arose out of and in the course of his employment.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson shall be affirmed in total and an award of compensation is hereby denied based upon the above findings.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay costs of the transcripts as follows:

Owens, Brake & Associates
Preliminary Hearing Transcript
Dated March 17, 1993

\$ 269.00

Free Lance Reporters, Inc. Deposition of Dr. Richard Loy Dated January 13, 1994	\$ 123.90
Underwood and Shane Deposition of Dr. C. Reiff Brown Dated May 17, 1994	\$227.50
Deposition of Lori Schussler Dated May 17, 1994	\$ 57.20
Deposition of Patty Ogle Dated May 17, 1994	\$163.80
Deposition of Lowell Schussler Dated May 17, 1994	\$ 97.60
Deposition of Mike Sohm Dated May 17, 1994	\$ 78.20
Deposition of Dennis Heinrichs Dated February 15, 1995	\$179.00
Total	\$803.30
Owens, Brake, Cowan & Associates Regular Hearing Transcript Dated February 10, 1995	\$259.90

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Kent Roth, Great Bend, Kansas
Julie Bedinghaus, Great Bend, Kansas
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director